No. 80-1466

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT C. PECHOUS,

Petitioner,

vs.

JOSEPH G. CATALANO, MYRTLE T. SLAWKO, RAYMOND G. COX, PAUL J. MATULA, EDWARD T. KUCHAN, RICHARD F. TOMAN and FRANK T. CLIFFORD,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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I. STATEMENT OF THE CASE

Petitioner's Statement of the Case contains matter that is inaccurate.

The underlying lawsuit herein was based on a false defamatory statement made by Petitioner on December 29, 1975 which was later repeated by him to a newspaper reporter, who included Petitioner's statement in a newspaper article published May 12-13, 1976.

1. Petitioner does not contest having made such defamatory statement to the newspaper reporter, but characterizes his December 29, 1975 statement as "alleged." As shown by the Illinois supreme court's opinion, that is inaccurate:

> "As the appellate court pointed out in its supplemental opinion, *neither in his briefs nor in oral argument did Pechous challenge either the accuracy of his quoted statement or the date when it was made.* Moreover, the representation made in his motion for summary judgment that there were no genuine issues of material fact necessarily presupposed that a statement had been made as alleged in the complaint. That he had made his statement at a council meeting was also the necessary predicate for the claim made in his motion for summary judgment that his statement was protected by executive privilege and also for his claim that he had had no time in which to investigate the truth of the statement. [Emphasis Supplied.]
>
> "It is thus apparent that Pechous invited both the circuit and appellate courts to decide the case by summary judgment in the hope that the judgment would be in his favor, and that he sought to repudiate his statement only after the appellate court had rendered a judgment adverse to him. Such a course of action is barred under the doctrines of invited error and of estoppel. [citing cases]" (5a)

2. Petitioner inaccurately stated (p. 9) Illinois law as to executive privilege and incorrectly stated (p. 11) that "The Supreme Court of Illinois held that... a City Clerk is not entitled to executive privilege." That privilege has been granted to a public official only as to statements "legitimately related to matters committed to his responsibility." *(Blair* v. *Walker* 64 Ill. 2d 1, 349 N. E. 2d 385) Both the Illinois appellate court (50a) and the Illinois supreme court (7a) found *Pechous* was not entitled to the executive privilege because *his duties with respect to the award of the contract* were ministerial only. His statement had nothing to do with his official duties.

3. While stating (p. 11) his argument to the Illinois supreme court "that summary judgment was inappropriate under the established rules. . . . ," Petitioner failed to report that court's ruling thereon;

> "It is thus apparent that Pechous invited both the circuit and appellate courts to decide the case by summary judgment in the hope that the judgment would be in his favor, and that he sought to repudiate his statement only after the appellate court had rendered a judgment adverse to him. Such a course of action is barred under the doctrines of invited error and of estoppel. [citing cases]" (6a)

4. While stating (p. 11) he raised federal questions of actual malice, fair comment and denial of equal protection of law in his argument to the Illinois supreme court, Petitioner failed to report that court's rulings thereon:

> ". . . we hold that Pechous' statements 'Two Hundred Forty pieces of silver changed hands—thirty for each alderman' and 'I think Two Hundred forty pieces of silver changed hands—thirty for each alderman,' . . . charged that the plaintiffs were paid a bribe . . . that the statement was defamatory; . . . that it was a statement of fact and not the constitutionally protected expression of an opinion; . . . " (14a)

> ". . . we are concerned with a defendant who was, . . . the original source of the defamatory statement. The basis for his charge of bribery, according to his brief, was only an inference which he drew from what he considered to be the precipitous manner in which the award was made. . . Pechous made no inquiry to ascertain whether it was his inference rather than another which was the correct one to draw.

> "Under the circumstances Pechous' statement, if not indeed a calculated falsehood, was, at the least, made with reckless disregard of whether it was true. *** His affidavit did not unqualifiedly declare that he believed his statement to be

true. Even if it had done so, we question whether it would negate the showing of actual malice. [citing] *St Amant* v. *Thompson*. . . . " (15a)

Nowhere in his petition does Petitioner challenge the correctness of those holdings.

II. The Writ Should Not Be Granted

PECHOUS' PETITION SHOULD BE DENIED BECAUSE THE ILLINOIS SUPREME COURT'S DECISION DOES NOT DENY HIM ANY CONSTITUTIONAL RIGHT.

1. Petitioner incorrectly argues (p.12) that this case imposes liability upon a critic of public officials' performance of their public actions, thus violating his First Amendment rights.

In rejecting that argument the Illinois supreme court said:

". . . we hold that Pechous' statements . . . charged that the Plaintiffs were paid a bribe for awarding the . . . contract . . ." (14a)

"To charge that the approval of the contract was procured by a bribe cannot fairly be transmuted into a criticism of the merits of the award of that contract." (9a)

Thereupon the court held that Pechous' statement "was a statement of fact and not the constitutionally protected expression of opinion." (14a) In support of that holding it cited numerous cases: *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323; *Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U. S. 6; *Old Dominion Branch No. 496, National Assn. of Letter Carriers* v. *Austin*, 418 U. S. 264; *Buckley* v. *Littell*, 539 F. 2d 882; *Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N. Y. 2d 369, 366 N. E. 2d 1299 and *Cianci* v. *New Times Publishing Co.*, ____ F. 2d ____, 49 U. S. L. W. 2070.

Nowhere in his petition does Pechous challenge the applicability of any of those citations.

2. Petitioner incorrectly argues (p. 23) that respondents failed to prove actual malice.

In summarizing its evaluation as to actual malice, the Illinois supreme court said:

> ". . . we are concerned with a Defendant who was, as his answers to interrogatories show, the original source of the defamatory statement. The basis for his charge of bribery, according to his brief, was only an inference he drew . . . Pechous made no inquiry to ascertain whether it was his inference rather than another which was the correct one to draw.
>
> "Under these circumstances Pechous' statement if not indeed a 'calculated falsehood' was at least, made with reckless disregard of whether it was true." (16a)

Petitioner cites no error in that analysis. Instead (p. 23) he incorrectly says:

> "Petitioner offered his affidavit which . . . denied that he spoke with actual malice."
>
> Petitioner's affidavit (81a) states:
>
> "That affiant did not act with malice in making the comments he did because his own brother was one of the aldermen being criticized by affiant."

Thereupon the court found petitioner's "affidavit did not unqualifiedly declare that he believed his statement to be true. Even if it had done so, we question whether it would negate the showing of actual malice. [citing *St. Amant* v. *Thompson*" (17a) Petitioner cites no error in that analysis either.

CONCLUSION

Petitioner's writ should not be granted because to accuse a public official of crime *without having any factual basis for such accusation* is not and cannot be expression protected by the First Amendment.

Respectfully submitted,

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